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ABSTRACT

The author makes two initial assertions regarding the use and presentation of closed meetings. First, the real problem is not how to present them to the public but how to present them to the media. Second, closed sessions should never be used unless absolutely necessary. After presenting the reasons for the "sunshine" laws, the author cites exceptions to such laws: discussions of attorney-client matters (especially involving litigation), collective bargaining matters, some personnel matters, records that are exempt from disclosure, real property negotiations, or student expulsions. Although other subjects might best be discussed privately, state legislatures have determined that the advantages of disclosure outweigh the advantages of privacy. The only exceptions are when private rights are involved or where public interest would be immediately (not just potentially) damaged. Possible embarrassment of board members or employees is not sufficient reason for a closed meeting. If a session must be closed, the reasons for doing so ought to be documented in writing. The discussion must be prevented from straying to another topic that cannot be discussed in closed session. As soon as possible, any decision made must be explained publicly as fully as possible. (Author/JM)

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"CLOSED (EXECUTIVE) SESSIONS: HOW TO USE & PRESENT THEM TO THE PUBLIC"

Remarks of

Edward C. Harms, Jr.

EA 013 848

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REMARKS OF EDWARD C. HARMS, JR.
NATIONAL SCHOOL BOARDS ASSOCIATION CONFERENCE C-44

"CLOSED (EXECUTIVE) SESSIONS: HOW TO USE & PRESENT THEM TO THE PUBLIC"

FRANKLY, I AM AT A LOSS TO EXPLAIN TO YOU WHY I RECEIVED THIS INVITATION, EXCEPT FOR THE COMMON ABILITY OF LAWYERS TO TALK AT LENGTH ON ANY SUBJECT, REGARDLESS OF THEIR KNOWLEDGE OR EXPERTISE, A DISABILITY FROM WHICH I ALSO SUFFER. THAT, AND THE FACT THAT I HAVE A LOUD VOICE. CAN EVERYONE HEAR? (FOOLISH QUESTION; MOTHER-WIFE-SELF ANALYSIS OF MY SPEAKING VOICE.)

I AM SERIOUS IN RAISING THE QUESTION OF WHETHER THE MORE APPROPRIATE SPEAKER WOULD NOT HAVE BEEN A PUBLIC RELATIONS EXPERT. MY EXPERIENCE WITH THE OREGON OPEN MEETINGS LAW WHILE ACTING AS ATTORNEY FOR A COMMUNITY COLLEGE, SCHOOL BOARDS, A CITY AND A MUNICIPAL UTILITY, AS WELL AS SERVING ON THE OREGON STATE BOARD OF HIGHER EDUCATION, HAS BEEN THAT IT DOESN'T MATTER WHAT THE LAW IS. IF THE LAW PROVIDES THAT THE MEETING SHOULD BE OPEN, AND THROUGH HONEST MISTAKE YOU CLOSE IT, YOU WILL BE ENGAGED IN A BLOOD FEUD WITH THE PRESS FOR VIOLATING THE LAW, GOOD FAITH NOTWITHSTANDING. ON THE OTHER HAND, IF THE LAW <u>DOES</u> ALLOW THE MEETING TO BE CLOSED YOU WILL ALSO BE PUBLICLY OSTRACIZED,

EDITORIALLY COMPARED TO STALIN, HITLER, PAPA "DOC" DUVALLIER, NOT TO MENTION THE DEVIL, AND OTHERWISE PUBLICLY EX-COMMUNICATED FROM THE SOCIETY OF FREE MEN, BECAUSE YOU DID ACT WITHIN THE LAW. Sometimes satisfying "failure" almost impossible.

(MOSES P R STORY)

I SUSPECT THAT WHAT I WAS REALLY SUPPOSED TO TALK TO YOU ABOUT TODAY IS "HOW TO USE AND PRESENT EXECUTIVE SESSIONS (GRACEFULLY) TO THE PUBLIC". I WOULD LIKE TO APPROACH THE PROBLEM WITH TWO MAJOR PREMISES.

THE FIRST OF THESE IS THAT THE REAL PROBLEM IS NOT HOW TO USE AND PRESENT THEM TO THE PUBLIC, BUT HOW TO USE AND PRESENT THEM TO THE MEDIA.

THE SECOND OF THESE IS "DON'T" - UNLESS YOU REALLY HAVE TO.

TO EXAMINE THESE TWO MAJOR PREMISES, WE TURN TO THE PURPOSE AND FORMS OF OPEN MEETINGS LAWS GENERALLY.

THE LEGISLATURES IN EVERY STATE HAVE ENACTED SOME KIND OF STATUTE REQUIRING THE MEETINGS OF GOVERNMENTAL BODIES, INCLUDING SCHOOL BOARDS, TO BE HELD IN SESSIONS WHICH ARE OPEN TO THE PUBLIC.

GENERALLY, IN PROTECTING THE PUBLIC INTEREST, THE STATUTES ARE DESIGNED TO INSURE ACCOUNTABILITY, AN INFORMED ELECTORATE AND THE SOVEREIGNTY OF THE PEOPLE BY ACKNOWLEDGING THE PRINCIPLE THAT PUBLIC ENTITIES WERE CREATED AS INSTRUMENTS OF THE GOVERNMENT AND SHOULD NOT HAVE THE POWER TO DECIDE WHAT IS GOOD FOR THE PUBLIC TO KNOW. OTHER ARGUMENTS IN FAVOR INCLUDE THE FOLLOWING:

- IT MAKES THE GOVERNMENT RESPONSIVE TO THE WISHES OF THE PUBLIC AND THEREBY INCREASES THE AMOUNT OF INFORMATION UPON WHICH GOVERNMENT DECISIONS MAY BE PREDICATED.
- IT PROMOTES CONFIDENCE IN THE GOVERNMENTAL DECISION MAKING PROCESS BY DISCOURAGING SECRECY AND THE APPEARANCE OF INEPTNESS OR CORRUPTION.
- IT INCREASES THE FLOW OF INFORMATION SO THAT THE MEDIA IS NOT FORCED TO RELY UPON BIASED LEAKS, BUT CAN REPORT EVENTS MORE ACCURATELY TO ABSENT MEMBERS OF THE PUBLIC.

I AM SURE THAT NO ONE IN THIS ROOM DISAGREES THAT THOSE ARE COMMENDABLE PURPOSES.

THE FORM WHICH THESE LAWS TAKE ARE GENERALLY ALL INCLUSIVE,

WITH LISTED EXCEPTIONS. THE OREGON LAW IS AN EXAMPLE AND IT STATES SIMPLY "ALL MEETINGS OF THE GOVERNING BODY OF A PUBLIC BODY SHALL BE OPEN TO THE PUBLIC AND ALL PERSONS SHALL BE PERMITTED TO ATTEND ANY MEETING EXCEPT AS OTHERWISE PROVIDED BY ORS 192.610-192.690."

THE MOST COMMON OF THE EXCEPTIONS REFERRED TO ARE THOSE PROVIDING THAT EXECUTIVE OR CLOSED SESSIONS MAY BE HELD FOR CERTAIN SPECIFIED PURPOSES.

THE ONES COMMON TO THE LAW IN MOST STATES ARE THE FOLLOWING.

1. ATTORNEY CLIENT MATTERS, PARTICULARLY THOSE INVOLVING CURRENT LITIGATION.
2. COLLECTIVE BARGAINING MATTERS. THESE ARE SOMETIMES RESTRICTED TO NEGOTIATING SESSIONS ONLY. THE PRESS IS OFTEN BARRED FROM THOSE SESSIONS.
3. PERSONNEL MATTERS. THE EXCEPTION INVOLVING PERSONNEL MATTERS MAY BE VERY BROAD ENCOMPASSING ALL DISCUSSIONS OF PERSONNEL MATTERS AND AT LEAST IN MANY AREAS, INCLUDING MY OWN, THE LAW WAS ASSUMED TO BROADLY EXEMPT ALL PERSONNEL MATTERS FROM DISCUSSION IN PUBLIC REGARDLESS OF WHAT IT

ACTUALLY SAID. MORE OF THE LAWS NOW, I BELIEVE, ARE NARROWER, LIMITING (OR ALLOWING) THE EXECUTIVE SESSION TO ONE OR MORE OF THE FOLLOWING: OR FOR,

(1) HIRING OF THE CHIEF EXECUTIVE OFFICER;

(2) HIRING ALL EMPLOYEES;

(3) DISCIPLINING OF EMPLOYEES, INCLUDING HEARING COMPLAINTS AND CHARGES AGAINST THEM AND;

(4) IN SOME STATES ONLY - NOT OREGON - EVALUATIONS FOR THE CHIEF EXECUTIVE OFFICER OR ALL OTHER EMPLOYEES.

4. TO CONSIDER RECORDS EXEMPT FROM DISCLOSURE. THIS IS OFTEN USED TO TRY TO REMOVE EVALUATIONS FROM PUBLIC SESSIONS WHEN THEY WOULD OTHERWISE BE REQUIRED TO BE DISCUSSED IN AN OPEN FORUM.

5. REAL PROPERTY NEGOTIATIONS.

6. STUDENT EXPULSIONS. BECAUSE OF THE DANGER OF HARM TO INDIVIDUALS AND PARTICULARLY MINORS, THE PRESS IS OFTEN

BARRED FROM SUCH SESSIONS.

THE ALMOST UNIVERSAL NATURE OF THE EXECUTIVE SESSION IS THAT, AT LEAST ON SOME SUBJECTS, IT MAY BE CLOSED TO ALL MEMBERS OF THE PUBLIC AND IN MANY CASES, IF ANY SPECIAL GROUP IS ADMITTED IT MUST BE OPEN TO ALL. THE MORE FREQUENT PROVISION IS THAT IT IS CLOSED TO ALL EXCEPT THE MEDIA.

GENERALLY, CONDITIONS ARE IMPOSED UPON THE MEDIA, SUCH AS "THE GOVERNING BODY MAY REQUIRE SPECIFIED INFORMATION WHICH IS THE SUBJECT OF EXECUTIVE SESSION NOT TO BE DISCLOSED." MOST LAWS HOWEVER, UNFORTUNATELY, PROVIDE NO PENALTY FOR A BREACH OF THAT REQUIREMENT.

I THINK YOU MUST HAVE COME TO THE CONCLUSION BY THIS TIME, EITHER FROM YOUR OWN EXPERIENCE OR FROM MY PRECEDING REMARKS, THAT THE OPEN MEETINGS, OR SO CALLED SUNSHINE LAWS, ARE NOT "PUBLIC RIGHTS" LAWS DESPITE THEIR FREQUENT COMMON CAUSE SPONSORSHIP. THEY ARE MEDIA RIGHTS LAWS. HAVING RECOGNIZED THIS WE SHOULD DEAL WITH THAT AND WE SHOULD ALSO DEAL WITH THE CONSEQUENCES OF EITHER CARELESSNESS, ERROR OR ABUSE IN USE OF THE

EXECUTIVE SESSION BECAUSE IN THAT EVENT YOU WILL CERTAINLY BE FACED WITH THE "SERIAL" OPEN MEETING STORY; ALWAYS REFERRED TO IN THE PRESS AS A "SECRET SESSION" AND RUNNING FOR DAYS, WEEKS, OR MONTHS REGARDLESS OF THE PERHAPS MINUSCLE IMPORTANCE OF THE SUBJECT DISCUSSED.

I AM SUGGESTING THAT MOST SCHOOL BOARDS SHOULD REACH SOME DECISIONS ON THE PHILOSOPHICAL APPROACH WHICH THEY WILL MAKE TO THE OPEN MEETINGS OR SUNSHINE LAWS. THE SUBJECT HAS BECOME, AT LEAST IN OREGON IN THE PAST FEW YEARS, ALMOST AN OBSESSION WITH SOME SCHOOL BOARDS AND CERTAINLY A MANIA WITH THE PRESS. NEARLY ALL OF THE QUESTIONS I AM ASKED BY THE SCHOOL BOARDS ASSOCIATION, WHICH I REPRESENT, AT THE REQUEST OF ITS MEMBERS, AND BY SCHOOL DISTRICTS I REPRESENT DIRECTLY, HAVE TO DO WITH WHAT CAN BE LEGALLY DISCUSSED IN EXECUTIVE SESSIONS; TOO FREQUENTLY, "WHAT CAN WE AVOID DISCUSSING IN OPEN SESSIONS"?

I AGREE, SOME THINGS COULD BETTER BE DONE PRIVATELY; IN MANY INSTANCES THE PUBLIC INTEREST WOULD BE BETTER SERVED BY PRIVATE RATHER THAN PUBLIC AIRING OF MANY DISCUSSIONS AND THE

DECISION MAKING PROCESS. THE BEST EXAMPLE THAT I KNOW OF IS ONE INVOLVING THE OREGON STATE BOARD OF HIGHER EDUCATION ON WHICH I SIT. WE ARE HAVING FINANCIAL PROBLEMS DUE TO THE DOWNTURN IN THE ECONOMY WHICH MAY RESULT IN OUR MAKING DECISIONS TO CLOSE CERTAIN INSTITUTIONS. HOWEVER, THE MERE PUBLIC DISCUSSION OF THE POSSIBILITY ALMOST CERTAINLY WILL DAMAGE THE INSTITUTION ALMOST BEYOND REPAIR IF A DECISION IS MADE NOT TO CLOSE IT. FACULTY WILL COMMENCE MAKING PLANS TO GO ELSEWHERE, ENROLLMENT WILL DROP OFF, AND PERHAPS MOST DISASTROUS OF ALL (ACCORDING TO SOME CIRCLES) THEY WILL NOT BE ABLE TO RECRUIT FOR FOOTBALL.

HOWEVER, THAT DECISION HAS BEEN MADE. THE LEGISLATURES OF OUR VARIOUS STATES HAVE DETERMINED THAT THE PUBLIC ADVANTAGE OF CONDUCTING PUBLIC BUSINESS IN PUBLIC OUTWEIGHS THE ADVANTAGES WHICH MAY BE OBTAINED FROM PRIVATE DISCUSSION IN MOST CASES.

WE CANNOT CONTINUE TO FIGHT THAT DECISION OVER AND OVER AND OVER AGAIN. MY GENERAL RECOMMENDATION IS THAT REGARDLESS OF THE LAW ON WHAT MAY BE DONE IN EXECUTIVE SESSION, THE BEST POLICY WOULD BE THAT ALL MATTERS AND ALL SUBJECTS SHOULD BE CONSIDERED AND

DISCUSSED AND ALL DECISIONS SHOULD BE MADE PUBLICLY IN OPEN MEETINGS. THE EXECUTIVE SESSIONS SHOULD BE RESORTED TO ONLY WHERE PRIVATE RIGHTS ARE INVOLVED OR WHERE IT IS AFFIRMATIVELY FOUND THAT THE PUBLIC INTEREST WOULD ACTUALLY (NOT JUST POTENTIALLY OR HYPOTHETICALLY) BE DAMAGED BY PUBLIC CONSIDERATION OF THE MATTER. DECISIONS SHOULD NOT BE BASED MERELY UPON WHETHER OR NOT THE LAW ALLOWS IT TO BE DONE IN EXECUTIVE SESSION.

WITH THAT GENERAL STATEMENT ABOUT THE PHILOSOPHICAL APPROACH WHICH I BELIEVE PUBLIC BODIES SHOULD TAKE, I WOULD LIKE TO OFFER THE FOLLOWING, MORE SPECIFIC, SUGGESTIONS ON REACHING THE DECISION OF WHETHER OR NOT TO CONSIDER THE MATTER IN EXECUTIVE SESSION.

FIRST AND FOREMOST, COUNSEL SHOULD BE CONTACTED, FULLY CONSULTED, AND THE OPINION OF COUNSEL SHOULD BE OBTAINED AS TO WHETHER OR NOT THE SUBJECT IS WITHIN THE PARAMETERS OF THE LAW ALLOWING EXECUTIVE SESSION. SIMPLY, DOES THE LAW ALLOW IT?

IF IT DOES WE RECOMMEND THAT FIRST THE SUPERINTENDENT AND CHAIRMAN, AND IF NECESSARY THE ENTIRE BOARD, ANSWER AT LEAST TO

THEIR OWN SATISFACTION THE FOLLOWING QUESTIONS.

1. Is there GREAT likelihood of harm? If there is, obviously you have the answer -- an executive session will have to be held.

2. Is litigation likely to be involved? If it is, then the executive session should be considered. It is not always possible to tell what will be damaging in later litigation.

3. Will private rights, protected by law, actually be injured? If so, it should be in executive session.

4. Is it merely more convenient to discuss the matter in closed session?

   If it is, the session should be open, even if a literal reading of the law allows an executive session.

5. Is the major objection to an open meeting the mere embarrassment of Board members or employees?

   If it is, the meeting should be open. Frank discussion

OF PERSONAL (PERSONNEL) MATTERS ARE SOMETIMES EMBARRASSING AND OPEN SESSIONS SOMETIMES INHIBIT THE TYPE OF FREE DISCUSSION THAT MIGHT BE DESIRABLE AND IN THE PUBLIC INTEREST.

UNFORTUNATELY THAT IS ONE OF THE "BLESSINGS" OF PUBLIC SERVICE. (ON THE OTHER HAND IT MAY ALSO INHIBIT RASH STATEMENTS.)

THE WHOLE PURPOSE OF THESE QUESTIONS (AND YOU CAN ADD MORE) IS TO SUGGEST THAT WHEN YOU REACH YOUR CONCLUSION YOU ARE ABLE TO SAY, AFFIRMATIVELY THAT THE PUBLIC INTEREST WOULD ACTUALLY AND DEMONSTRABLY BE HARMED BY HOLDING THE MEETING IN PUBLIC.

TO SUPPORT THIS WE SUGGEST THAT WRITTEN FINDINGS BE MADE RECITING THE SPECIFIC HARM WHICH WOULD RESULT WHICH WOULD BE EITHER PART OF THE MEETING CALL OR RELEASED WITH IT.

HAVING DOCUMENTED THE NECESSITY OF THE CLOSED SESSION, I WOULD OFFER THE FOLLOWING RECOMMENDATIONS REGARDING CONDUCT AT THE CLOSED SESSION.

FIRST, ALMOST WITHOUT EXCEPTION, LEGAL REPRESENTATION SHOULD BE PRESENT BECAUSE THE MEDIA, IF PRESENT, MAY WELL

CHALLENGE THE DISCUSSION IF IT STRAYS IN THE LEAST FROM THE SUBJECT WHICH YOU FOUND WAS WITHIN THE LAW.

I ALSO WOULD CAUTION AGAINST DISCUSSIONS OF PERIPHERAL ISSUES WHICH MAY NOT BE WITHIN THE PROPER PURPOSES FOR EXECUTIVE SESSION. THIS REQUIRES SOME JUDGMENT AND RESTRAINT ON THE PART OF BOARD MEMBERS.

HAVING HELD THE EXECUTIVE SESSION, OUR SUGGESTION TO OUR BOARDS IS THAT THERE BE RELEASED TO THE MEDIA IMMEDIATELY ANYTHING THAT CAN BE RELEASED. AN EXAMPLE OF THIS MIGHT WELL BE THE GENERAL FACTS OF REAL PROPERTY NEGOTIATIONS WITHOUT DISCLOSING NAMES OR SPECIFIC PRICES.

FINALLY, SINCE FINAL ACTION, UNDER MOST LAWS, CANNOT BE TAKEN DURING THE EXECUTIVE SESSION IT WILL HAVE TO BE CONFIRMED AT A LATER PUBLIC MEETING. AT THAT PUBLIC MEETING OUR RECOMMENDATION IS THAT THERE BE AS FULL AN EXPLANATION AND DISCUSSION AS POSSIBLE IN ADDITION TO THE VOTE.

IN CONCLUSION, I CANNOT REALLY TELL YOU HOW TO HAVE THE EXECUTIVE SESSION ENTHUSIASTICALLY RECEIVED BY THE MEDIA OR

THE PUBLIC.

I THINK PROBLEMS HOWEVER, WOULD BE CONSIDERABLY REDUCED IF THE BOARD REMAINS AT ALL TIMES CONSCIOUS OF THE FACT THAT IT SHOULD ONLY BE UNDERTAKEN IN THE STRICTEST COMPLIANCE WITH THE LAW; THAT IT SHOULD NOT BE UNDERTAKEN AND WILL NOT BE UNDERTAKEN BY YOUR BOARD AS A MATTER OF POLICY IF IT CAN BE DISCUSSED IN OPEN SESSION WITHOUT DOING ACTUAL HARM EVEN THOUGH THE LAW MIGHT ALLOW IT AND LAST, THAT AS FULL A PUBLIC DISCLOSURE AS IS POSSIBLE SHOULD BE UNDERTAKEN AT THE EARLIEST POSSIBLE DATE.

I GUESS MY FINAL ADVICE WOULD BE THAT OF MARK TWAIN WHO SAID:

"ALWAYS DO RIGHT; THIS WILL PLEASE A FEW OF THE PEOPLE AND ASTOUND ALL THE REST."